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Articles

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Jan Mojak
Maria Curie-Skłodowska University (Lublin), Poland
ORCID: 0000-0002-0503-7078
jan.mojak@mail.umcs.pl

Szymon Skowerski
The John Paul II Catholic University of Lublin, Poland
ORCID: 0000-0001-7118-2436
szymonskowerski@gmail.com

Professor Jan Gwiazdomorski's Role in Shaping Modern Security Interests in the Second Republic of Poland*

Rola Profesora Jana Gwiazdomorskiego w tworzeniu nowoczesnych zabezpieczeń wierzytelności w II Rzeczypospolitej

CORRESPONDENCE ADDRESS: Jan Mojak, PhD, Assistant Professor, Maria Curie-Skłodowska University (Lublin), Faculty of Law and Administration, Department of Civil Law, 5 Maria Curie-Skłodowska Square, 20-031 Lublin, Poland; Szymon Skowerski, PhD, The John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration, Institute of Legal Sciences, Collegium Joannis Pauli II, Racławickie 14, 20-950 Lublin, Poland.

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ABSTRACT

The article explores the legacy of Professor Jan Gwiazdomorski, a distinguished civil law scholar, in shaping modern security interests. It revisits his interwar writings on ownership as a means of securing claims, contributions that advanced the institution of pledge in the legal framework of the Second Republic of Poland. The study also traces the emergence of the registered pledge in the legislation of that period. Moreover, it considers Professor Gwiazdomorski's involvement in the Civil Law Codification Committee, with particular emphasis on his contribution to retaining in the 1964 Civil Code the rudiments of real security rights, including pledge (notwithstanding objections as to their alleged incompatibility with socialist legal principles). The analysis concludes with a discussion of the registered pledge in contemporary law. It highlights Professor Gwiazdomorski's role as a bridge linking the finest traditions of the Second Republic's civil law scholarship with that of post-communist Poland.

Keywords: Jan Gwiazdomorski; pledge; registered pledge; history of law; civil law

INTRODUCTION

The profound and invaluable contribution of Professor Jan Gwiazdomorski, a distinguished civil law jurist, to the regulation of modern instruments of bank claim security – most notably those pertaining to credit agreements – has been reflected in contemporary law through the institution of the registered pledge. This scholarly endeavour is particularly discernible during the era of the Second Republic of Poland and in the Professor's works addressing credit agreements, assumption of debt,[1] and, above all, his analyses of pledge within the legal regimes of the former partitioning powers, as elaborated in his civil law textbooks. With his participation, the Polish legislator succeeded in regulating the principal forms of pledge, including the judicial registered pledge. It is not without significance that in the nascent state, the Code of Obligations[2] and the Commercial Code[3] were among the first codifications to be enacted. These legislative acts (several provisions of which were drafted by Professor Gwiazdomorski[4]) incorporated a range of fundamental legal institutions instrumental in the economic development of the newly reconstituted state.[5] Professor Gwiazdomorski emphasized that in the contemporary, highly de-

[1] See J. Gwiazdomorski, *W kwestii przejęcia długu i przerachowania długu przejętego. Uwagi do wyroku Sądu Najwyższego z dn. 14 września 1926 Lcz. III. Rw. 861/26*, "Głos Prawa" 1928, no. 1, pp. 5–16; idem, *Przejęcie długu*, Kraków 1927.

[2] Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws 1933, no. 82, item 598).

[3] Regulation of the President of the Republic of Poland of 27 June 1934 – Commercial Code (Journal of Laws 1934, no. 57, item 502).

[4] J. Gwiazdomorski, *Przejęcie długu…*, pp. 194–197.

[5] Idem, *Kodeks zobowiązań. Część I. Art. 1–35*, Kraków 1934; idem, *Kodeks zobowiązań. Część II. Art. 36–60*, Kraków 1934; idem, *Kodeks zobowiązań. Część III. Art. 61–90*, Kraków 1934.

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veloped and complex structures of economic life, credit performs a pivotal function. A capitalist economy is inconceivable without borrowing. Consequently, a creditor who elects to allocate capital naturally strives to obtain appropriate security from the debtor. The creditor's expectation is directed towards removing, or at the very least mitigating, the risk of capital loss, and towards achieving the highest attainable degree of certainty of its return. The greater the risk and the weaker the prospective debtor's economic standing, the more firmly the creditor will endeavour to obtain more reliable security for the debt. "It is evident that for deprived societies – and, regrettably, Polish society must be included among them – the expansion of both the forms and the modalities of credit security is of primary significance, in economic as well as legal terms. This expansion consists, i.a., in the endeavour to extend the catalogue of rights employed to safeguard the creditor. These rights that are intended in the first instance to perform a protective function, and for which this function constitutes their essential characteristic, are the right of pledge (in all its manifestations) and warranty".[6] To safeguard the certainty of commercial relations, the debtor – or another party – may encumber their asset (be it a thing, claim, patent, etc.) with a right to the effect that, should the debtor fail to return the debt on time, the creditor may satisfy the claim from the pledged property. This creditor's right, which may also arise by virtue of a law or judicial order, is called a pledge (*Pfandrecht, le gage, le nantissement, l'hypothèque, le privilège*).[7]

THE FORMATION OF THE INSTITUTION OF REGISTERED PLEDGE IN THE LEGISLATION OF THE SECOND REPUBLIC OF POLAND

The rapid development of economic activity and the exigencies of commercial turnover in reborn Poland led to the emergence of a novel form of real security, namely the pledge, whereby the pledged item remained in the possession of the pledgor.[8] Pursuant to a contract, the debtor created a limited real right over the immovable property in their possession, yet the pledged asset was not transferred to the pledgee. The debtor or the pledgee would enter the pledge into a public register

[6] Cf. idem, *Nowoczesne sposoby zabezpieczania kredytu. Własność jako prawo zabezpieczające. Wykład wygłoszony dn. 14 października 1931 r. w cyklu powszechnych wykładów wyższego studium handlowego w Krakowie pod tytułem „Wskazania dotyczące poprawy współczesnej sytuacji gospodarczej"*, Kraków 1932, pp. 3–4.

[7] J. Gwiazdomorski, L. Oberlender, T. Sołtysik, F. Zoll, *Prawo cywilne (opracowane głównie na podstawie przepisów obowiązujących w Małopolsce)*, vol. 1: *Część ogólna*, Poznań 1931, pp. 124–125; J. Ignatowicz, *Prawo rzeczowe*, Warszawa 1994, p. 265 ff.; F. Zoll, *Prawo cywilne, prawa zastawnicze*, Kraków 1937, passim.

[8] J. Gwiazdomorski, *Nowoczesne sposoby zabezpieczania kredytu…*, pp. 3–4; J. Mojak, J. Widło, *Zastaw rejestrowy i rejestr zastawów. Komentarz. Wyd. 5*, Warszawa 2020, p. 13.

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kept by the courts or other authorities. Once registered, the pledge acquired rights enforceable *erga omnes*. The creditor (pledgee) thus obtained security, while the debtor (pledgor) provided that security without losing possession of the asset or the ability to use the pledged property as before.[9]

The first legislative measures of the Second Republic of Poland relating to the registered pledge addressed the institution of the so-called agricultural registered pledge. Pursuant to the Regulation of the President of the Republic of Poland of 22 March 1928 on the agricultural registered pledge,[10] this form of security could be established exclusively by natural persons (Article 1) running an agricultural holding or a commercial or industrial enterprise trading in or processing agricultural products (Article 2). A registered pledge could be established only in favour of state credit institutions, municipal savings banks, and other credit institutions designated by the Minister of the Treasury (Article 3).[11]

An agricultural pledge could be established exclusively on agricultural products belonging to the pledgor and deposited in their immovable property, or in a property leased, rented, or otherwise held in use by them, or alternatively stored in another place agreed upon by the pledgor and the credit institution (Article 4). The establishment of an agricultural registered pledge was effected pursuant to a contract concluded in written form with notarised signatures. The pledge contract had to specify the pledged asset and its location, and the amount secured (Article 5). As against third parties, an agricultural registered pledge came into effect upon entry in a pledge register maintained for that purpose. Pledge registers were maintained by the municipal court competent for the place where the pledged asset was deposited. It was a public book (Articles 6 and 7). An entry in the register was effected upon application by either the pledgee or the pledgor on the basis of the pledge contract. The pledged asset remained in the pledgor's possession; however, its identity – that is, the fact of its encumbrance with a registered pledge – was to be established by means of a permanent and visible mark affixed to it, or in another way (Article 8).[12]

A substantively similar form of pledge – applicable to both felled, unprocessed, and processed wood – was provided for in the Act of 14 March 1932 on the registered pledge on timber.[13]

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[9] J. Gwiazdomorski, L. Oberlender, T. Sołtysik, F. Zoll, *op. cit.*, pp. 124–125; J. Mojak, J. Widło, *Zastaw rejestrowy i rejestr zastawów. Komentarz*, Warszawa 2020, p. 13; E. Gniewek, [in:] *System Prawa Prywatnego*, vol. 3: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2020, pp. 21–22.

[10] Journal of Laws 1928, no. 38, item 360, as amended.

[11] J. Gwiazdomorski, L. Oberlender, T. Sołtysik, F. Zoll, *op. cit.*, pp. 124–125; J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 13; E. Gniewek, [in:] *System Prawa Prywatnego*, vol. 4: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2021, p. 369.

[12] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 14.

[13] Journal of Laws 1932, no. 31, item 317.

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Pursuant to the Act of 28 April 1938 on registered real rights in motor vehicles,[14] it was permissible to establish a pledge over motor vehicles through registration, and likewise to secure the seller's claim by registering a reservation of ownership until receipt of the purchase price. The registers of retentions of title and of pledges established in favour of creditors were maintained by the administrative authorities. In essence, this form of security – pledge over motor vehicles – came close in practice to transfer of ownership for security purposes.[15]

Another piece of legislation – the Act of 15 June 1939 on the registered pledge on machines and equipment[16] – permitted the establishment of a registered pledge on new, unused machines and equipment purchased for industrial and artisanal undertakings. This right could be created to secure the purchase price in favour of the seller, provided the seller was a registered trader, or in favour of credit institutions that had granted the buyer a loan for the purchase of new, unused machines and equipment, up to the amount of the sum provided (Articles 1 and 2). Machines and equipment subject to a pledge did not, by their mere attachment to the real property, become either its appurtenances or its components for the entire duration of the pledge (Article 3). They remained in the debtor's possession (Article 4). The debtor was likewise under an obligation to affix to them, in a conspicuous place, an inscription attesting to the existence of the pledge (Article 5).[17]

The right of pledge was recorded in the register of pledges on machines and equipment belonging to industrial and artisanal undertakings (Article 16). The register was maintained by the municipal court having jurisdiction over the undertaking's location (Article 18). It was of a public nature (Article 17).[18]

The regulations in question concerning the registered pledge continued to apply after World War II. They were repealed no earlier than by Article V of the Act of 23 April 1964 – regulations implementing the Civil Code,[19] and lapsed on 1 January 1965.

A distinctive form of pledge in interwar law was the commercial pledge. It was governed by the Commercial Code and introduced to respond to the needs of commercial transactions. The commercial pledge allowed the pledgee to satisfy their claims by selling the pledged asset without having to obtain an enforcement order.[20]

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[14] Journal of Laws 1938, no. 36, item 302, as adjusted.

[15] Cf. observations on the analogous application of the rules on the pledge right to transfer of ownership for security purposes: J. Gwiazdomorski, *Nowoczesne sposoby…*, p. 8.

[16] Journal of Laws 1939, no. 60, item 394, as amended.

[17] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 15; E. Gniewek, [in:] *System Prawa Prywatnego…*, vol. 4, p. 369.

[18] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 15.

[19] Journal of Laws 1964, no. 16, item 94, as amended.

[20] E. Gniewek, [in:] *System Prawa Prywatnego…*, vol. 4, p. 369.

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Under Article 507 of the Commercial Code, a pledge was deemed commercial if its creation was a commercial act for both parties and if its object was movable property or securities. Accordingly, the creation of a contractual commercial pledge required that both parties to the contract be traders (merchants) acting within the scope of their undertakings. The claim secured by the pledge, however, could originate from either a bilateral or a unilateral legal act. A contract-based commercial pledge was to be distinguished from a statutory pledge, which could likewise be created under the provisions of the Commercial Code.[21]

The establishment of a commercial pledge required the execution of a written contract, provided that the document was furnished with an officially certified date. Under Article 507 § 2 of the Commercial Code, the pledge contract was a formality required for evidentiary purposes, while the official certification of the effective date was intended to prevent prejudice to the pledgor's creditors. Accordingly, a pledge established in breach of the formal requirements remained valid between the parties, yet was ineffective *erga omnes*.[22]

In commercial relations, the rules on good faith in acquiring ownership of movables also applied to the creation of a pledge.[23] Consequently, a pledge could also be constituted over property belonging to a third party, provided the pledgee was in good faith as to the merchant's right of disposition, that is, they acted under an erroneous yet reasonable belief that the pledgor was vested with the right to dispose of the pledged item. The construction of the commercial pledge in the Commercial Code was designed primarily to ensure that the pledgee could achieve satisfaction of their claim from the pledged asset without undue delay and in a straightforward manner in the event of the debtor's default.[24]

As a general rule, the sale of an item under a commercial pledge was effected by means of a public auction conducted by a bailiff or a notary public, and where the pledged item was admitted to exchange trading, also by a broker. Items admitted to stock exchange trading could also be sold by private sale at the daily market price. The procedure for conducting such auctions was set out in detail in the Commercial Code and in the Regulation of the Minister of Justice of 1 July 1934 concerning the conduct of public auctions under Articles 510, 547 and 670 of the Commercial Code.[25]

From the proceeds of the sale, the costs of the sale were to be covered in the first instance, thereafter public dues, and the balance applied towards satisfaction

[21] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 16.

[22] *Ibidem*.

[23] J. Gwiazdomorski, L. Oberlender, T. Sołtysik, F. Zoll, *op. cit.*, p. 308.

[24] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 16.

[25] Regulation of the Minister of Justice of 1 July 1934 issued in agreement with the Ministers of Industry and Trade and of the Treasury, on the procedure for public auctions under Articles 510, 547 and 670 of the Commercial Code (Journal of Laws 1934, no. 59, item 510).

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of the pledgee's claim. The creditor notified the debtor of the sale in writing, unless such notification was impossible or the debtor was present at the auction.[26]

Where a commercial pledge was established on securities, the pledgee had the right to satisfy their claim from the pledged securities, even if their maturity fell before the maturity of the secured debt. The pledgee was vested with the right to collect the monies and allocate the sum so obtained towards satisfaction of the claim without recourse to enforcement proceedings. The pledgee holding the pledged securities was, however, under an obligation to take and perform all necessary steps for their protection.[27]

The provisions of the Commercial Code concerning the commercial pledge were repealed by Article VI of the Act of 23 April 1964 – regulations implementing the Civil Code.

The pledge with retention of ownership by the pledgor was likewise present, albeit to a limited extent, in the legislation of the People's Republic of Poland. Professor Jan Gwiazdomorski participated in the work of the Civil Law Codification Committee, drafting a new Civil Code. As one of its most active contributors, he succeeded, notwithstanding its incompatibility with the principles of socialist law, in preserving the rudiments of the institution of pledge.[28] Nevertheless, the institution of pledge was embodied in the legislation of communist Poland from its earliest days.

Article 23 of the Decree of 11 October 1946 – Property Law[29] permitted the creation of a pledge over movable property necessary for the personal exercise of a profession, provided such property was not an appurtenance of an immovable property, and on condition that the pledge was created in favour of a credit or cooperative institution. The encumbered item remained with its owner, provided it was permanently and conspicuously designated as pledged. The relevant pledge contract was required to be attested by a document bearing an officially certified effective date. In its design, this pledge was akin to the registered one, with the sole distinction that public pledge registers did not exist at that time.[30]

Article 308 of the 1964 Civil Code contained a reference to the so-called bank-registered pledge. The provision authorised the establishment of a pledge in favour of a bank over movables belonging to the pledgor while leaving it in the possession of the pledgor or a third party. Still, the bank registered pledge could serve exclusively as security for credits offered by banks functioning within the

[26] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 17.

[27] *Ibidem*.

[28] Minutes of the meeting of the civil law team held on 10 September 1957, no. 65/22/1-918/57, pp. 2–6.

[29] Journal of Laws 1946, no. 57, item 319.

[30] J. Mojak, J. Widło, *Zastaw rejestrowy…*, p. 18.

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so-called socialised economy.[31] A pledge contract was required, under penalty of nullity, to be concluded in written form. It was required to specify the pledged asset and its characteristics. The pledge arose upon entry of the contract in the register of pledges kept by the bank, that is, the creditor and pledgee at the same time. The right of pledge persisted irrespective of any modifications to the encumbered asset through processing, and in the event of its combination with other things, the pledge extended to the entire combined asset.[32]

CONCLUSIONS

The regulation embodied in Article 308 of the 1964 Civil Code was devised for the purposes of a centralised planned economy predicated upon the state financing of enterprises. Thus conceived, the pledge essentially represented an evidentiary construct rather than genuine security, lacking practical significance in the domain of social ownership of the means of production. This illusory institution of the pseudo-registered pledge was discontinued on 1 January 1998 when the Act of 6 December 1996 on the registered pledge and the register of pledges[33] repealed said Article 308 and, in its stead, incorporated a provision permitting the establishment of security in the form of a registered pledge under separate laws.[34]

At present, Polish law provides for only a single form of registered pledge. This registered pledge operates such that the encumbered asset remains in the possession of the pledgor, while its delivery to the pledgee, as a condition precedent for the establishment of the pledge, is supplanted by an entry in the relevant register. Accordingly, the entry in the register determines the existence of the pledge and renders the right effective *erga omnes* (Article 38 (1) of the Act on the registered pledge and the register of pledges). The registered pledge thus constitutes a limited right *in rem*. Article 308 of the 1964 Civil Code refers to the registered pledge as a variety of the ordinary pledge, remitting the matter to other specific provisions. What sets the registered pledge apart is that, beyond the basic rights and duties of the parties laid down by statute, the pledge contract itself may significantly shape the content thereof.[35] In this respect, the present form of the pledge continues the proud tradition of the Second Republic of Poland. The survival of the institution of

[31] J. Mojak, *Przelew wierzytelności zabezpieczonej zastawem*, "Palestra" 1986, no. 4, p. 34.

[32] Idem, *Sądowy zastaw rejestrowy*, [in:] *Prawne zabezpieczenia wierzytelności bankowych*, eds. E. Niezbecka, A. Jakubecki, J. Mojak, Kraków 2000, pp. 352–353.

[33] Journal of Laws 1996, no. 149, item 703. Today, the Act of 6 December 1996 on the registered pledge and the register of pledges (consolidated text, Journal of Laws 2018, item 2017).

[34] J. Mojak, *Zastaw na wierzytelnościach*, "Rejent" 1994, no. 10, pp. 100–101.

[35] J. Mojak, J. Widło, *Sądowy zastaw rejestrowy w systemie praw rzeczowych*, "Rejent" 1999, no. 4, p. 72.

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pledge in the legal norms of the People's Republic of Poland would not have been possible without the substantial contribution of Professor Jan Gwiazdomorski and his scholarly writings, particularly those devoted to ownership as a right securing claims.[36] Owing to the course charted by the Professor, and with the contribution from the Lublin jurists' community, the institution of the registered pledge was reconstructed within the framework of private law in the present-day Third Republic of Poland. It was within the Lublin academic milieu that the first scholarly works devoted to this form of security in the legal framework of today's Poland were produced, notably Poland-first commentary on the Act on the registered pledge and the register of pledges.[37] Lublin likewise became the seat of the first Department of Registered Pledges established at the local district court.[38]

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[36] J. Gwiazdomorski, *Nowoczesne sposoby…*, passim.

[37] E. Niezbecka, J. Mojak, *Ustawa o zastawie rejestrowym i rejestrze zastawów. Komentarz*, Lublin 1997, passim.

[38] J. Mojak, D. Pelak, J.A. Sieklucki, J. Widło, *Umowa o ustanowienie zastawu rejestrowego*, Lublin 1998, passim.

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Regulation of the Minister of Justice of 1 July 1934 issued in agreement with the Ministers of Industry and Trade and of the Treasury, on the procedure for public auctions under Articles 510, 547 and 670 of the Commercial Code (Journal of Laws 1934, no. 59, item 510).

ABSTRAKT

Artykuł poświęcony jest działalności wybitnego cywilisty Profesora Jana Gwiazdomorskiego, obejmującej tworzenie nowoczesnych zabezpieczeń wierzytelności. W opracowaniu zostały omówione prace Profesora Gwiazdomorskiego z okresu dwudziestolecia międzywojennego z zakresu prawa własności jako prawa zabezpieczającego wierzytelność. Prace te przyczyniły się do rozwoju instytucji zastawu w prawodawstwie II Rzeczypospolitej. Ponadto zaprezentowany został rozwój instytucji zastawu rejestrowego w prawodawstwie II Rzeczypospolitej. Opisano również działalność Profesora w ramach Komisji Kodyfikacyjnej Prawa Cywilnego, w szczególności wkład w pozostawienie w Kodeksie cywilnym z 1964 r. zrębów instytucji zabezpieczeń rzeczowych, w tym zastawu (pomimo podnoszonych uwag o jego niezgodności z zasadami prawa socjalistycznego). Rozważania wieńczy opis kształtu instytucji zastawu rejestrowego we współczesnym systemie prawa. Wskazano też na rolę Profesora Gwiazdomorskiego jako swoistego łącznika najlepszych tradycji cywilistycznych II Rzeczypospolitej z cywilistyką Polski postkomunistycznej.

Słowa kluczowe: Jan Gwiazdomorski; zastaw; zastaw rejestrowy; historia prawa; prawo cywilne